common carrier cable operators; or any combination of the three. The 1996 Act's codification of a definition of "information service" did not mark a sudden discovery that information, distinct from the underlying transmission facilities, should be unregulated. Nor, most certainly, did it represent a conclusion that unregulated information can only be made available via telecommunications services offered by Title II common carriers.[46] Quite the contrary, the definition reflects the Commission's distinction between basic and enhanced services, which was adopted to encourage the offering of enhanced services by *exempting* them from Title II regulation.

> 110. . . . [A]n entity which acquires the same transmission facilities from a carrier and offers a 'communications' service is presently regulated as a common carrier under Title II of the Act. . . .
>
> 111. This means that its services must be artificially structured so as to not come under our [Title II] regulatory umbrella . . . . To the extent services must be so structured there is a corresponding inability to fully tailor services to consumer needs. . . .
>
> 112. The second public interest implication is the increased potential for expansion of regulation over currently unregulated providers of information or data processing services. . . . [T]he tentative conclusion that a resale carrier would be able to offer both regulated and unregulated enhanced services . . . carried with it significant regulatory and market implications for presently unregulated firms. . . . "One result may be an indirect forcing of currently unregulated entities to acquire common carrier status in order to obtain the same degree of flexibility afforded a resale common carrier."[47]

Thus, the basic/enhanced dichotomy was designed to accommodate "the trend in technology . . . toward new and innovative enhancements that build upon basic services . . . . Services need not be artificially structured or limited so as to avoid transgressing a

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[46] *See*, Comments of Earthlink at 21-25.

[47] *Computer II Final Order*, 77 F.C.C.2d 384, at ¶¶ 100-112 (1980).

regulatory boundary."[48] The statutory definition of "information service," the progeny of the basic/enhanced dichotomy, should not be used to give birth to a requirement that cable service offerings be "artificially structured or limited so as to avoid transgressing a regulatory boundary."

While freeing enhanced service providers from the constraints of Title II regulation, the basic/enhanced dichotomy did not relinquish the Commission's Title II authority over telecommunications service providers who carried enhanced services. "The common carrier offering of basic transmission services are communications services and regulated as such under traditional Title II concepts."[49] By that same logic, the cable service offering of basic transmission services are cable services and regulated as such under traditional Title VI concepts. Simply stated, the transmission of AOL's enhanced services over common carrier DSL facilities does not change the classification of the common carrier's service--it is still providing telecommunications service; and the transmission of AOL's enhanced services over a cable system should not change the classification of the cable operator's service—it is still providing cable service. The basic transmission service in either case is simply broadband service, and the Commission has made clear that "broadband service does not include content, but consists only of making available a communications path on which content may be transmitted and received." [50]

C. Cable Modem Service is a Title VI Cable Service.

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[48] *Id.* at ¶ 117.

[49] *Id.* at ¶ 7.

[50] *Advanced Services Report*, 14 FCC Rcd. 2398, at ¶ 23 (1999).

1. The statutory definition of cable service is broad enough to include cable modem service, and the structure of Title VI compels the conclusion that Congress intended to preserve Title VI authority over cable operators providing services other than traditional one-way video programming.

The introduction of broadband Internet access to the cable platform provides no warrant for the conclusion that Internet access is not a "cable service" regulated under Title VI. The 1996 Act amendment to the definition of "cable service" to include "subscriber interaction required for the selection or *use*" of video programming or other programming services clearly anticipated "the evolution of cable to include . . . *information services* made available to subscribers by the cable operator." [51] The amendment marked the necessary abandonment of the no longer viable distinction, reflected in the legislative history of the 1984 Act, between "providing subscribers with the capacity to retrieve information — capacity which may be part of a cable service — . . . [and] the capacity to engage in off-premises data processing — an additional capacity which may not be offered as part of a cable service."[52] By 1996, Congress understood that the 1984 formulation would thwart the overriding objective of the 1984 Act — "to assure that cable systems provide the widest possible diversity of information services and sources to the public, consistent with the First Amendment's goal of a robust marketplace of ideas."[53] It is all the more clear five years later.

While expanding the definition of cable service to include the *use* of other programming services, Congress offered not a hint that the provision of interactive

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[51] H.R. Rep. No. 104-458, at 169 (1996) (emphasis added).

[52] H.R. Rep. No. 98-934, at 42-44 (1984).

[53] *Id.* at 19.

broadband service would escape Title VI regulatory authority, and the structure of the Cable Act suggests the contrary.[54] Section 621 flatly prohibits local franchising authorities from "impos[ing] *any* requirement under this subchapter that has the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator. . . ."[55] Information services, however, are treated on a par with video programming under § 624, which bars the establishment of "requirements for video programming or *other information services*" in a request for proposals, but permits the enforcement of franchise requirements "for broad categories of video programming or other services."[56]

The Act's identical treatment of "video programming" and "other information services" under § 624, as distinct from "telecommunications service" under § 621, establishes that Congress knew what it was doing and did what it intended:

- The Cable Act's definition of "cable service" to include "video programming or *other programming service*" is at least broad enough to embrace both "video programming" and "*other information services*" under § 624.

- "Any cable service" may be provided on a cable system free of "regulation as a common system carrier" per § 621(c)[57]and includes, at least, both "video programming" and" *other information services*" that the cable operator may provide under § 624.

- The Commission's authority, and that of local franchising authorities, to regulate the provision of "*other information services*" under Title VI is no

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[54] Compare § 621 to § 624.

[55] 47 U.S.C. § 541(b)(3)(B).

[56] 47 U.S.C. § 544(b) (emphasis added).

[57] 47 U.S.C. § 621(c) (emphasis added).

greater and no less than their authority to regulate the provision of video programming.

2. Cable modem service must be classified as a cable service to preserve the regulatory scheme devised by Congress.

The Commission cannot amend the unambiguous regulatory scheme devised by Congress. Congress intended "cable services" and "telecommunications services" to fall within separate regulatory schemes. Any Commission conclusion that cable modem service is not subject to Title VI would substantially vitiate the regulatory scheme devised by Congress. Specifically, Congress understood and intended that local governments should share oversight of "cable services" with the Commission. Congress understood and intended that local governments were best positioned to negotiate specific "services and facilities" that the cable operator would be required to provide to address local and specific "community needs and interests." The Commission itself has relied extensively on Title VI to encourage the deployment of advanced cable services, including cable modem service through the "Social Contracts" mechanism. The Commission used Title VI authority to negotiate a revenue stream for cable operators in exchange for promises to roll-out advanced cable networks. This revenue stream came from cable subscribers in the form of increased cable service rates under the Social Contracts. The benefits should continue to flow to cable subscribers in the form of advanced "cable services."[58] This use of Title VI in the Social Contracts illustrates and underscores the fundamental soundness and vigor of the Title VI regulatory regime.

[58] Initial comments of Local Government Coalition at 19-22.

Advanced cable services subject to Title VI are susceptible to Commission directive to accelerate and implement deployment.

The Commission should not divide the broadband services provided by a cable operator over a cable system between Title VI and Title II, or more problematically between Title VI and no regulation at all. The effects are largely unpredictable, and an observer need not be a pessimist to anticipate that the effects will be very negative on the Commission's own initiatives. Advanced cable services are not subject to effective marketplace competition today. Monopoly cable system providers will "forum shop" for the least intrusive regulatory status. The Commission (and local governments) will lose authority to encourage deployment of advanced services by cable systems to reduce the "digital divide." Local governments will have no authority to protect consumers from billing and customer service abuses.

Nor are the risks limited to advanced services. Permitting a cable operator to select the regulated, or non-regulated status of cable modem service will inevitably corrode the applicability of Title VI to traditional cable services. All cable services, even traditional one-way video programming, can be delivered via the cable modem platform. CBS Evening News is now or soon will be available, not just at 6:30 p.m. EST, but all night long via streaming video from a link to the Internet. Cable modem technology accesses the full range of "information services" now delivered on cable systems as "cable services." If cable modem service is not cable service, Title VI approaches irrelevance as the cable operator discovers economic advantage in removing traditional cable services from Title VI regulation.

The classification of cable modem service as a cable service is not only necessary to preserve the Commission's own Title VI authority over the cable industry, but also the authority of local governments. Local regulation of cable service pre-dates the Commission's involvement—primarily because cable service is, finally, a local service, the progeny of Community Antenna Television Systems. The growth of the industry and technological advances have made the cable television industry a vital part of the nation's communications infrastructure. As early as 1968, the Commission noted that cable service was "rapidly evolving from its original role as a small, five-channel, reception service bringing television broadcast signals to areas which lack broadcast service." In the Commission's words, "cable technology may be on the verge of expanding system capacity to 20 or more channels, and . . . a variety of new services to the public are envisioned."[59] That was the year before the Department of Defense commissioned ARPANET,[60] the precursor of the Internet, but even then the Commission saw the promise of cable television with uncanny prescience:

> It has been suggested that the expanding multichannel capacity of cable systems could be utilized to provide a variety of new communications services to homes and businesses within a community, in addition to services now commonly offered such as time, weather, news, stock exchange ticker, etc. While we shall not attempt an all-inclusive listing, some of the predicted services include: facsimile reproduction of newspapers, magazines, documents, etc.; electronic mail delivery; merchandising; business concern links to branch offices, primary customers or suppliers; access to computers; e.g., man to computer communications in the nature of inquiry and response (credit checks, airlines reservations, branch banking, etc.), information retrieval (library and other reference material, etc.), and computer to computer communications . . . .

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[59] *In the Matter of Amendment of Part 74,* Notice of Proposed Rulemaking, 15 F.C.C.2d 417, at ¶ 4 (1968).

[60] Robert Hobbes Zakon, *Hobbes' Internet Timeline*, http://www.isoc.org/zakon/Internet/History/-HIT.html (viewed January 7, 2000).

> It has been suggested further that there might be interconnection of local cable systems and the terminal facilities of high capacity terrestrial and/or satellite intercity systems, to provide numerous communications services to the home, business, and educational or other center on a regional or national basis. . . . More broadly in the area of general communications, the present and future development of intercity facilities with very high communications capacity . . . coupled with the potential of the computer and communications satellite technologies, may stimulate the provision of new nationwide or regional services of various kinds, which would require connection to high capacity communications facilities within the locality and from the street to the premises of the consumer. . . .[61]

The evolution of cable service — from its genesis as a purely local network designed to extend the availability of broadcast video programming to the fulfillment of the Commission's vision with the introduction of cable modem service — fully confirms the Commission's recognition in 1968 that "[t]he possibility of a multipurpose local CATV communications system, and of national interconnection of such systems . . . raises a number of questions pertinent to the Commission's responsibilities and national communications policy . . . ."[62]

At the same time, however, cable service remains an essentially local service. Cable systems are defined by the communities they serve. The facilities and equipment that make up the "cable system," and the video programming and other programming services that make up the "cable service," differ substantially from one community to the next. Even as it saw the promise of cable technology, the Commission recognized that local governments should play an important role in assuring the fulfillment of that promise. The Commission stated that it intended to "rely largely on local authorities to see to it that CATV meets local communications requirements and interests to the

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[61] *In the Matter of Amendment of Part 74,* Notice, *supra*, ¶¶ 8-9.

[62] *Id.* at ¶ 60.

satisfaction of the community."[63] The Commission framed the issue and invited public comment:

> What should be the division of regulatory functions between Federal and State or local authorities . . . Which aspects of the local system or systems would require uniformity and centralized regulation or would be important to the effectuation of national communications policies, which aspects would be primarily of local concern and appropriately subject to State or local regulation, and which aspects might better be left unregulated? [64]

The Commission resolved those issues by adopting "a deliberately structured dualism," recognizing that "local governments are inescapably involved in the process because cable makes use of streets and ways;" that "[l]ocal authorities are . . . in better position to follow up on service complaints;" and that "[s]ome governmental body must insure that a franchise applicant's qualifications are consistent with the public interest, and we believe this matter is appropriate for local determination."[65]

When Congress adopted the Cable Communications Policy Act of 1984, it largely codified the "deliberately structured dualism" devised by the Commission. Congress endorsed the Commission's reliance on local governments to franchise cable systems under "franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community."[66] Congress structured Title VI to "establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of

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[63] *Id. at* ¶ 21.

[64] *Id.* at ¶ 60.

[65] *In the Matter of Amendment of Part 74*, 36 F.C.C.2d 141, at ¶¶ 177-79 (1972).

[66] 47 U.S.C. § 521(2).

cable systems."[67] The authority reserved to local governments was not pro forma — it reflected "a national policy that . . . continues reliance on the local franchising process as the primary means of cable television regulation . . . ."[68] The 1984 Act specifically provided that "[n]othing in subchapter shall be construed to affect any authority of any State, political subdivision, or agency thereof, or franchising authority, regarding matters of public health, safety, and welfare, to the extent consistent with the express provisions of this subchapter."[69]

The increased utility and ubiquity of cable television systems has assuredly raised new concerns within the Commission's sphere of authority—national communications policy. This new complexity does not reduce the importance of the requirement that these networks must address local needs and interests. The Commission is no better equipped today than in 1984 to "assure that cable systems are responsive to the needs and interests of the local community." To the contrary, local communities remain best positioned to define and to negotiate the "requirements for facilities and equipment; and for broad categories of video programming or other services." 47 U.S.C. §624(b)(2). Advanced cable services, in the form of broadband services and Internet access delivered over the cable modem platform, have become increasingly critical to the economic welfare and quality of life in our communities. In two respects in particular, local franchising authorities depend on the classification of cable modem service as a cable service.

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[67] 47 U.S.C. § 521(3).

[68] H.R. Rep. No. 98-934 at 19 (1984).

[69] 47 U.S.C. § 556(a).

a. Preserving the authority of local governments under Title VI will contribute to the rapid deployment of broadband services.

First, local franchising authorities share with Congress and the Commission a commitment to the rapid deployment of broadband services. If the deployment of broadband service is important to the national economy it is every bit as important to local economies.[70] Moreover, local governments are uniquely positioned to advance that national policy. Broadband technology is not deployed "nationally;" it is deployed locally—street by street. Local franchising authorities across the country conduct extensive ascertainment proceedings in aid of "identifying the future cable-related community needs and interests,"[71] and use the determinations reached in those proceedings to press local cable systems to upgrade their facilities to provide interactive broadband capability. Local franchising authorities are demanding, cajoling, and offering concessions to prod cable operators to upgrade the facilities provided in their communities.

Two affidavits are attached to these reply comments. One is from a City Councilman in Fort Morgan, Colorado, deeply engaged in negotiations with the local cable operator. The second is from members[72] of the Summit County

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[70] Comcast Corporation argues that local regulation will discourage the deployment of cable modem service (Comcast Comments, at 40-42), but can point to only three instances in which the ostensible delay was occasioned, not by local regulation, by uncertainty regarding local authority to regulate.

[71] 47 U.S.C. § 546(a)(1)(A).

[72] Bernie Zurbriggen; Daniel Teodoru, Assistant County Attorney for Summit County; Clay Brown, Town Manager for the Town of Frisco; Julie Boyd, Town Manager for the Town of Dillon and Kevin Batchelder, Town Manager for the Town of Silverthorne.

Telecommunications Consortium ("SCTC").[73] Both affidavits illustrate the important role that local government officials play in aid of the Commission's efforts to encourage the rapid deployment of broadband services.[74] Both affidavits also illustrate the importance of treating cable modem service as a cable service in support of local efforts to encourage the deployment of broadband service. In Fort Morgan and the jurisdictions represented in the SCTC affidavits, the cable operator was persuaded to upgrade the cable system to support interactive broadband, but refused to commit to providing cable modem service, pointing to uncertainty regarding its regulatory status.

The affidavit provided by the Fort Morgan Councilman also illustrates a recurrent problem that will arise if cable operators are allowed to provide cable modem service, but local franchising authorities are stripped of regulatory authority regarding the provision of the service. The Councilman reports that the local franchising authority considered renewing the incumbent's franchise for a shorter term so that it could re-negotiate the franchise after its legal authority to negotiate and enforce franchise provisions regarding the provision of cable modem service had been clarified. The incumbent operator indicated it would refuse to upgrade the cable system in *any respect* unless it was awarded a fifteen-year term.

The two affidavits illustrate:

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[73] The SCTC is an agency formed by intergovernmental agreement that works together on telecommunications issues of mutual interest. One of the first goals of the SCTC was to jointly negotiate a Model Franchise Agreement with AT&T which could be adopted by each entity.

[74] Affidavits of Donald Clutter and members of the SCTC are attached.

1) Communities want cable modem service; have absolutely no reason to obstruct it; and will make concessions to get it.

2) Federal preemption of local authority will not remove an obstacle to deployment. Rather, federal preemption would neutralize a uniquely effective advocate for deployment.

3) Treating cable modem service as outside the scope of "cable services" will handcuff local franchising authorities and will give cable operators a negotiating advantage to extract concessions with respect to matters that *are* covered by the franchise agreement in return for promises that *are not* covered by the franchise.

Local Governments submit that the Commission and local governments should work together as allies seeking to advance the same policy of encouraging the rapid deployment of broadband services. The Commission should frankly acknowledge that local government authority under Title VI to "establish requirements for facilities and equipment," and to enforce franchise requirements "for broad categories of video programming or other services,"[75] extends to requirements for facilities and equipment that enable the offering of interactive broadband services, and the ability to enforce franchise requirements regarding the provision of cable modem service.

b. Preserving the authority of local governments under Title VI is essential to the protection of consumers.

[75] 47 U.S.C. § 544(b).

Comments filed by Charter Communications pose the question: "Suppose a newly installed customer sits down at the PC, and the Internet does not work. Who do they call?"[76] Well, they may call the cable company first, and even repeatedly, but unless the problem is resolved they will turn to their local cable regulatory authority.

In 1968 a Notice of Inquiry, the Commission noted that "the normal protection afforded consumers by providing a choice between alternative suppliers has not, in most instances, been available to the cable television subscriber."[77] In the rules subsequently adopted, the Commission noted that "local authorities are . . . in better position to follow up on service complaints,"[78] and adopted a rule requiring that franchise agreements provide for the investigation and resolution of local service complaints.[79] The Commission later adopted a rule requiring local franchising authorities to designate a local official for administering complaint procedures.[80] In 1977, the Commission repealed the rule requiring local authorities to adhere to specific consumer complaint procedures. The Commission found that "the design and enforcement of complaint procedures are inherently matters for local resolution," and concluded that the repeal of the rule would have "the beneficial effect of permitting local authorities greater flexibility in determining what complaint procedures are most appropriate for their communities."[81] At the same time, the Commission expanded the franchise fee revenue base to include

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[76] Comments of Charter Communications, Inc., at 21

[77] *In the Matter of Amendment of Part 74* (Notice), *supra*, at ¶ 22.

[78] *In the Matter of Amendment of Part 74* (Report and Order), *supra*, ¶ 177.

[79] *Id.* at ¶ 184.

[80] *In the Matter of Amendment of Part 76*, 50 F.C.C.2d 43, at ¶ 15 (1974).

pay-per-view programming, leased access and advertising revenues, relying largely upon the "responsibility of franchisors to implement procedures for the investigation and resolution of complaints regarding cable operations including pay cable and other auxiliary service operations."[82] The Commission noted the rapid growth of auxiliary services offered on the cable platform, and concluded that "complaints resulting from the operation of those auxiliary services are correspondingly extensive and are likely to increase in the future."[83] Finally, the Commission hewed to its reliance on local authorities when it adopted regulations implementing the Cable Television Consumer Protection and Competition Act of 1992: "We believe that as a practical matter, customer service requirements can be enforced most efficiently and appropriately on a local level where such enforcement historically has occurred. Accordingly, we conclude that the customer service standards we adopt today should be enforced by local franchise authorities."[84]

As with the introduction of auxiliary services addressed in 1977, the Commission can reliably expect that complaints resulting from the offering of cable modem service are also likely to increase as the service is introduced by cable systems across the country. The cable subscribers will expect that the local cable franchising authority is the appropriate authority to address those complaints. Indeed, the franchising authority has

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[81] *In the Matter of Amendment of Subparts B and C of Part 76,* 66 F.C.C.2d 380, at ¶ 41 (1977)

[82] *Id.* at ¶ 69.

[83] *Id.*

[84] *In the Matter of Implementation of Section 8 of the Cable Television Consumer Protection and Competition Act of 1992,* 8 F.C.C.R. 2892, at ¶ 19 (1993) (footnote omitted).

established procedures for registering and addressing consumer complaints, and established working relationships with franchisee personnel for resolving them.

Classification of cable modem service as anything but a Title VI cable service will throw consumers into a neverland that Charter's question only hints at. Charter observes that the consumer's problem could be a fault in the cable connection, which needs to be fixed by the cable operator, or a fault in the ISP's service, which needs to be addressed by the ISP. That is a real problem, and Charter rightly observes that both cable operator and ISPs will need to develop procedures for identifying the locus of the problem, and handing it off to the company responsible for solving it.[85] It is also probably true, as Charter maintains, that the problem is exacerbated by providing cable modem access to multiple ISPs, but Charter indicates that it has every intention of providing access to multiple ISPs.[86] There is every reason to hope that cable operators will develop procedures for resolving consumer complaints, whether the cable operator offers access to one ISP or several ISPs. But the question remains: who does the consumer call if the cable operator and the ISP(s) fail to establish procedures for identifying and fixing the problem, if the cable operator and the ISPs predictably point to each other as the responsible party.

The division of regulatory responsibilities for services provided over cable facilities will only mirror and compound the problem identified by Charter. If the cable operator and the ISP cannot (or will not) assign (or assume) responsibility when "the Internet does not work," how are the regulatory authorities to determine whether the

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[85] Comments of Charter Communications, Inc., *supra*.

complaint is within the jurisdiction of the state authority that regulates telecommunications services, the local authority that regulates cable services, or the federal authority which must presumably conclude that it is no longer "ill-equipped to resolve local disputes."[87]

There is nothing in the record in this proceeding to alter the Commission's insistence more than 30 years ago that "local, State and Federal governmental agencies must face up to providing some means of consumer protection in this area."[88] Local franchising authorities have faced up to that responsibility. The Commission needs to protect consumers by assuring cable modem service remains subject to local consumer protection authority.

III. OPEN ACCESS ISSUES

The industry comments filed in this proceeding frame the open access issues raised by the Commission in starkly uncompromising terms. The Competitive Telecommunications Association urges the Commission to treat cable operators as local exchange carriers, and to require them to provide unbundled transmission capacity, upon request, at cost-based rates and non-discriminatory terms and conditions.[89] Incumbent local exchange carriers demand the abandonment of common carrier regulation of

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[86] *Id.* at 8.

[87] *In the Matter of Amendment of Subparts B and C of Part 76 of the Commission's Rules Pertaining to Applications for Certificates of Compliance and Federal-State/Local Regulatory Relationships, supra*, ¶ 41.

[88] *In the Matter of Amendment of Part 74* (Notice), *supra*, ¶ 22.

[89] Comments of the Competitive Telecommunications Association; *See also* Comments of Earthlink at VII; Comments of OpenNet Coalition at 3-4.

common carriers offering broadband services, or else that it extend common carrier regulation to all broadband services.[90] The cable industry urges the Commission to adhere to a policy of "vigilant restraint," but the vigilance is pointless and the restraint gratuitous because the cable industry insists that the Commission may not in any event lawfully require cable companies to provide access to competing ISPs, no matter how cable modem service is classified.[91]

Local Governments suggest a middle ground. In our initial comments we urged the Commission to "make clear that it expects cable operators will provide unaffiliated ISPs with non-discriminatory access to the cable modem platform sooner rather than later," and to "also make clear that it will not hesitate to address artificial restraints upon the development of meaningful competition." Our initial comments elaborated on the legal authority and public policy interests which permit and counsel that approach, and we will not reiterate them in this reply. In sum, Local Governments submit:

- The Commission has authority under Title VI to insure that cable service providers do not abuse their control of the cable facility to restrict access to diverse sources of information.

- If the Commission concludes that cable modem service is not a Title VI cable service, then it must assure access to diverse sources of information under the authority provided by Title II.

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[90] *See*, Comments of SBC Communications, Inc. and BellSouth Corporation.

[91] *See*, Comments of the National Cable Television Association at 18-37.

- The Commission cannot in any event conclude that cable modem service escapes meaningful regulatory oversight because cable modems are the only broadband communications pathway available to much if not most of the public.

The last point addresses an argument offered by each of the cable industry commenters. The argument, as framed by the National Cable Television Association, contends that "the substantial investments in a multiplicity of broadband providers renders government-mandated access to cable unnecessary."[92] Cox Communications, Inc. claims it faces competition in the provision of broadband services in Phoenix, in franchise areas in Connecticut and Rhode Island, in Orange County, and Oklahoma City, and argues that "taken together, these data demonstrate that Cox already faces considerable competition in the provision of high-speed Internet access."[93] More generally, the cable industry commenters rely on the Commission's own repeated conclusion that the broadband services market is competitive.[94]

The analysis is flawed and ignores the Commission's own market statistics. Relevant markets for purposes of assessing market power require the identification of both a product market and a geographic market.[95] Accepting the proposition that other broadband technologies compete with cable modem service, it remains that the relevant market is geographically discrete. Evidence of competition in the markets identified by

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[92] *Id.* at 43.

[93] Comments of Cox Communications, Inc. at 9-12.

[94] See, e.g., Comments of the National Cable Television Association at 41-47, and Commission proceedings cited therein.

Cox establishes at most the existence of competition in those markets. Competition in Phoenix, Arizona does not do anything for the consumer in Winslow, Arizona. The Commission's conclusion that "competition is emerging, rapid build-out of necessary infrastructure continues, and extensive investment is pouring into this sector of the economy,"[96] reflects a fair assessment of the market for broadband services across the nation. It does not begin to account for the disparities among relevant geographic markets. The fact that DSL is chasing cable modem service for market share nationwide simply does not make any difference if DSL is not available to a particular address.

The most recent data on the deployment of high-speed Internet services indicates that there is only one provider (if there is even one provider) in more than half of the country's zip codes.[97] Even that statistic fails to reflect the granularity of the relevant geographic market. Within the roughly 47% of zip codes that have two or more providers, there are non-contiguous areas that are served only by a single provider or none at all. The Commission has acknowledged, "we cannot determine from our data the

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[95] *See,* Phillip E. Areeda, et al., *Antitrust Law* § 530 (2d ed. 1995).

[96] Comments of the National Cable Television Association, *supra*, p. 42, citing *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 14 FCC Rcd 2398 at ¶ 48 (1999).

[97] *High-Speed Services for Internet Access: Subscribership as of June 30, 2000,* Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission (October 2000).

extent to which the presence of high-speed service in a given zip code indicates that high-speed services are widely available, or whether they are restricted to a few customers."[98]

It is the availability of "last-mile" facilities which defines the market for broadband access. "While all components of the network play important roles in the delivery of advanced services, we focus particular attention on the deployment of last mile facilities because they are often the missing link in communities that do not have access to advanced telecommunications capability."[99] The disparities between competitive conditions in those discrete geographic markets, and the variety of local market attributes that will influence the persistence of those disparities, are unambiguously established by the Commission's case studies of broadband deployment in Los Angeles County, California; Waltham, Massachusetts; Muscatine, Iowa; Miller, South Dakota; and Wilsondale, West Virginia.[100]

The need to take into account the presence of competition in discrete geographic markets means at least that the Commission cannot abdicate its regulatory authority based on a macro analysis of an imagined nationwide market for broadband service. Local Governments submit that it also compels the conclusion that the Commission should acknowledge the authority of local governments to protect local consumer access to

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[98] *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability,* Second Report, FCC 00-290, at ¶ 78 (2000).

[99] *Id.* at ¶ 28.

[100] *Id.* at ¶ 112, *et seq.*

diverse sources of information under their Title VI authority to enforce franchise requirements "for broad categories of video programming or other services."[101]

IV. CONCLUSION

Local Governments urge the Commission to reject the argument that cable modem service must be regulated as common carriage. Whether access to interactive broadband facilities need always be offered on a common carrier basis is a matter within the Commission's discretion, and the Commission has long pursued a policy of providing industry and the public with alternatives to the common carrier model of providing and acquiring communications services. The Commission should classify cable modem service as a cable service to encourage continued and increased facility-based competition between cable operators and ILECs.

The Commission should adopt a middle ground between the demands for common carrier-style access to the cable head-end and the demands that the Commission and local governments are powerless to address anti-competitive abuses of market power. If cable modem service is not a cable service, then it must be a telecommunications service, and must be subjected to Title II regulation. The Commission can and should avoid this result. Title VI provides the Commission with sufficient authority to insure that cable operators do not restrain competition between affiliated and unaffiliated content providers, and that cable operators provide consumers with meaningful choice between competing ISPs.

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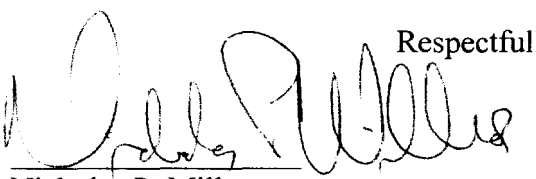
[101] 47 U.S.C. § 544(b).

In particular, the relevant market for interactive broadband service is not only a product market defined by acceptable substitutes for cable modem technology; it is also defined geographically by *available* substitutes for cable modem technology. This geographic dimension of the market for interactive broadband services is persistently local. The diversity of local market conditions counsels the Commission to explicitly acknowledge the role of local governments in advancing the deployment of cable modem facilities. The Commission should rely on local governments to identify "the future cable-related community needs and interests" as well establish "requirements for facilities and equipment" in cable franchise agreements. And local governments are best positioned to enforce franchise requirements for deploying this cable service.

Respectfully submitted,



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January 10, 2001

AFFIDAVITS

AFFIDAVIT OF BERNIE ZURBRIGGEN; DANIEL TEODORU, ASSISTANT COUNTY ATTORNEY FOR SUMMIT COUNTY; CLAY BROWN, TOWN MANAGER FOR THE TOWN OF FRISCO; JULIE BOYD, TOWN MANAGER FOR THE TOWN OF DILLON AND KEVIN BATCHELDER, TOWN MANAGER FOR THE TOWN OF SILVERTHORNE

State of Colorado)
) ss.
County of Summit)

Affiants duly sworn, and upon his oath, states as follows:

1. The affiants are Bernie Zurbriggen, an elected member of the Town Council for the Town of Frisco, Colorado; Daniel Teodoru, Assistant County Attorney for Summit County; Clay Brown, Town Manager for the Town of Frisco; Julie Boyd, Town Manager for the Town of Dillon and Kevin Batchelder, Town Manager for the Town of Silverthorne.

2. Summit County is located on the west side of the Continental Divide, approximately 70 miles west of Denver. The County is primarily known for its ski areas, other outdoor recreational amenities, and tourism. The County is home to the Keystone, Arapahoe Basin, Copper Mountain and Breckenridge Ski Resorts.

3. There are four municipalities in Summit County. Three of them, the towns of Frisco (population approximately 3000), Silverthorne (population approximately 3200) and Dillon (population approximately 800), together with a portion of unincorporated Summit County (population approximately 5000) are provided cable services by AT&T. A little over a year ago, these three municipalities and the County joined together to form the Summit County Telecommunications Consortium ("SCTC"). The SCTC is an agency formed by intergovernmental agreement that works together on telecommunications issues of mutual interest. One of the first goals of the SCTC was to jointly negotiate a Model Franchise Agreement with AT&T which could be adopted by each entity.

4. We are members of the Board of Directors of the SCTC. Elected and appointed officials from each of the four communities serve on the SCTC Board. In this capacity, we have been actively involved in our franchise negotiations with AT&T.

5. Our community needs assessment activities as well as our general knowledge of the citizens we represent indicates that cable modem service is a very important service for our residents and business. Our citizens are looking to expand their access to distance learning, telemedicine, telecommuting, E-commerce and interactive entertainment which will be made possible by access to broadband high speed internet access. DSL is not available in most parts of the County.

6. In the franchise draft that has been presented to the SCTC Board, AT&T has agreed to upgrade our cable system to 750 MHz. However, AT&T has also refused to commit in a franchise to provide broadband cable modem services. AT&T's position is that cable modem services are not clearly defined as cable services under the Communications Act, and therefore these services cannot be regulated in a cable franchise. Moreover, AT&T suggests that it is likely that the services will be provided, yet the company will make no definitive representation to our communities that our citizens will be provided comparable broadband services as those